**Marvin Neiman, Individually, and d/b/a Concourse Nursing Home and its alter ego CNH Management Associates, Inc. and its alter ego Concourse Rehabilitation and Nursing Center, Inc. *and* Local 144, Service Employees International Union, AFL–CIO**. Cases 2–CA–28638, 2–CA–28776, 2–CA–28777, 2–CA–28778, and 2–CA–28841

June 11, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX, AND BRAME

On March 11, 1997, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party Union each filed cross-exceptions with supporting briefs and answering briefs to the Respondent's exceptions, and the Respondent filed an answering brief to the General Counsel's and the Union's cross-exceptions and a reply brief in further support of its exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified below, to modify the remedy,[2] and to adopt the recommended Order as modified.

We adopt the judge's finding that Marvin Neiman, individually, and d/b/a Concourse Nursing Home; CNH Management Associates, Inc. (CNH), and Concourse Rehabilitation and Nursing Center, Inc. (CRNC), the Respondent, are alter egos and a single employer and are liable for the various unfair labor practices in this proceeding. We also adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by its July 1995 refusal to meet and bargain with the Union and by its failure to remit various benefit fund contributions for the periods specified by the judge. However, contrary to the judge, we find that additional pension fund contributions are due for the licensed practical nurses. We also reverse the judge's finding that the Respondent failed to submit remittance reports on benefit fund contributions as required by the parties' contract. Lastly, for the reasons stated below, we reverse the judge and find that Marvin Neiman is not individually liable for periods after October 1995, when CRNC became the owner and operator of the nursing home.

1. Regarding Neiman's individual liability for the violations found here, the evidence shows that, in July 1991, Marvin Neiman d/b/a Concourse Nursing Home individually executed a collective-bargaining agreement in which he agreed, as sole proprietor of the nursing home, to assume the benefits and obligations set forth there. That contract expired on September 30, 1994. After the expiration date, Neiman's obligation to make fund payments as a contract signatory survived given the Respondent's refusal to bargain on a successor agreement here.[3]

However, in October 1995, Neiman incorporated CRNC, and CRNC became the owner and operator of the nursing home. When CRNC took over for Neiman as the owner and operator of the nursing home, CRNC was likewise substituted for Neiman as the obligor for further contributions to the Union's trust funds and for remedying any other unfair labor practices unless the General Counsel has established that there are adequate grounds to justify piercing the corporate veil of CRNC to impose continuing individual liability on Neiman. The standard the Board applies in that regard was set out in *White Oak Coal*, 318 NLRB 732 (1995), enfd. 81 F.3d 152 (4th Cir. 1996).

In *White Oak*, the Board adopted a two-part test for piercing the corporate veil and held that it would impose personal liability only when: "(1) the shareholder and corporation have failed to maintain separate identities, and (2) adherence to the corporate structure would sanction a fraud, promote injustice, or lead to an evasion of legal obligations." Id. at 732. Regarding the first prong of this two-part test, the Board stated in *White Oak* at 735 (footnotes omitted), that:

> When assessing the first prong to determine whether the shareholders and the corporation have failed to maintain their separate identities, we will consider generally (a) the degree to which the corporate legal formalities have been maintained, and (b) the degree to which individual and corporate funds, other assets, and affairs have been commingled. Among the specific factors we consider are: (1) whether the corporation is operated as a separate entity; (2) the commingling of funds and other assets; (3) the failure to maintain adequate corporate records; (4) the nature of the corporation's ownership

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In cross-excepting, the General Counsel argues that the judge inadvertently failed to include in his remedy a provision directing the Respondent to reimburse the unit employees for any expenses resulting from the Respondent's failure to make required pension and education fund contributions. The Union makes a similar argument in its cross-exceptions with respect to reimbursing employees for the expenses they incurred because of the Respondent's failure to make education fund payments. Based on *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), we find merit in these cross-exceptions and we modify the judge's remedy to require that the Respondent reimburse the unit employees, with interest, for pension and education expenses they incurred by virtue of the Respondent's unlawful conduct.

[3] *Excelsior Pet Products*, 276 NLRB 759, 763 (1985).

and control; (5) the availability and use of corporate assets, the absence of same, or undercapitalization; (6) the use of the corporate form as a mere shell, instrumentality or conduit of an individual or another corporation; (7) disregard of corporate legal formalities and the failure to maintain an arm's-length relationship among related entities; (8) diversion of the corporate funds or assets to noncorporate purposes; and, in addition, (9) transfer or disposal of corporate assets without fair consideration.

In her brief to the judge, counsel for the General Counsel argued that the first prong of the *White Oak* test was met because "the corporation's ownership and control rests in Neiman alone; the corporate assets are available for Neiman's personal use; and there has been commingling, diversion and disposal of corporate asssets without fair consideration." Although it appears that Neiman has retained ownership and control of CRNC, the General Counsel has failed to point to evidence and to establish that CRNC's assets are available to Neiman personally or that he has commingled CRNC's funds since its incorporation in 1995. Moreover, the General Counsel has not even argued that there is any evidence here regarding numerous of the other factors that the Board considers with respect to the first prong of *White Oak*. Because CRNC meets at most only one of the nine factors that constitute the first prong of this test, we conclude that the General Counsel has failed to establish that, subsequent to the time that CRNC began owning and operating the nursing home in October 1995, Marvin Neiman and CRNC "failed to maintain separate identities." Thus, at the least the General Counsel has not established the first prong of the test and we are constrained from piercing the corporate veil in this situation. For these reasons, we do not impose individual liability on Marvin Neiman for periods after October 1995.

2. The General Counsel and the Union have excepted to the judge's finding that the Union is barred by Section 10(b) of the Act from seeking pension contributions for the Respondent's licensed practical nurses (LPNs) for periods before June 1, 1995. For the reasons stated below, we find merit to the General Counsel's and the Union's exceptions to these findings.[4]

As stated, in July 1991 the parties entered into a collective-bargaining agreement that expired on September 30, 1994. As part of this agreement, the parties agreed to a 35-month moratorium on future contributions to the Union's pension fund because of a ~~surplus in the fund. Anthony Petrell~~a, the pension fund's Anthony Petrella, the pension fund's administrator, testified that the moratorium ended on May 30, 1994,[5] and that the Respondent was obligated to resume making payments to the fund beginning in June.

Petrella stated that the Union's pension fund did not receive any contributions from the Respondent for the unit employees covering the month of June until the following October.[6] Petrella also said that the fund accounting staff, after receiving the Respondent's October pension check, determined, by multiplying the applicable contractual rate by the gross payroll for June, that the payment total was less than the fund should have received. The record shows that all the pension fund contributions that the Respondent made during the ensuing months were also "short" by the calculations of the fund's accountants.

In addition, Petrella testified that the fund office administers nine or ten separate funds and that it receives monthly contributions from a total of 170–200 employers contributing to these various funds. The frequency of inadequate or otherwise incorrect payments to the funds is so great that, according to Petrella, the fund office has prepared a form letter that it sends monthly to those employers whose contributions are less than the proper amount. The record shows that in October the Union's fund office sent a "short notice" letter to the Respondent stating that its pension fund contributions for "July" were deficient. The fund sent similar letters notifying the Respondent of pension underpayments the following months.

After Petrella received no response to these "short notice" letters, he contacted Aaron Kaufman, an agent for the Respondent, in May or June 1995 to discuss the shortages. Kaufman then informed Petrella that the Respondent was refusing to make pension contributions for its LPNs until further notice. Petrella replied that this did not make sense to him because the Union's welfare fund was receiving contributions for these employees. Kaufman explained that he had "filed some sort of petition" regarding the LPNs that precipitated this action.[7] Thereafter, the Respondent ceased all pension contributions for months since June 1995.

In finding that, by operation of the Section 10(b) limitation, the Respondent is not liable under the Act for pension fund contributions for the LPNs accruing before June 1, 1995, the judge summarily concluded that "[t]he Union was aware that a reduced Pension Fund payment was made, and could have learned the reason for such

[4] We note that the Union initially filed the charge in Case 2–CA–28841 relating to the Respondent's failure to remit fund contributions for its licensed practical nurses on October 19, 1995, and later amended that charge on February 9, 1996. Because the 10(b) period for this allegation commenced on April 19, 1995, even without regard to whether the Union was on notice of the unfair labor practices before that date, the Union is entitled at least to monthly contributions after May 1, 1995 for these employees.

[5] All dates are in 1994, unless otherwise noted.

[6] Petrella also administered the Union's welfare fund and had been receiving these payments from the Respondent on the unit employees' behalf. There was no contractual moratorium on welfare contributions.

[7] On November 8, 1994, H.B. Management Services Corporation (H.B.), found by the judge to be the Respondent's agent, had filed a unit clarification petition with the Board seeking to exclude the licensed practical nurses from the bargaining unit as statutory supervisors. The petition, which the Union moved to dismiss, is still pending.

underpayment in a timely manner [case citation omitted]." We conclude that, contrary to the judge, Section 10(b) does not bar us from finding that the Respondent owes the Union pension fund contributions for the LPNs from the date that the moratorium on such contributions ended.

The Board has consistently held that the Section 10(b) period does not begin to run until the aggrieved party has received actual or constructive notice of the conduct that constitutes the alleged unfair labor practice.[8] It is the Respondent's burden to establish here that the Union "was on clear and unequivocal notice" more than 6 months before the charge was filed that the Respondent had ceased making pension fund contributions for the LPNs.[9]

Although there is no dispute that the Union was aware of the shortfall in the pension contributions from the time the Respondent began to make them in October 1994, we conclude that the Respondent has failed to establish that the Union should have known that a cause of the shortfall was the Respondent's exclusion of the LPNs from pension coverage.[10] We stress that the Respondent failed to introduce into evidence any reports that it submitted to the pension fund that may have given the Union notice that it had not made contributions on the LPNs' behalf. Furthermore, the evidence shows that the Respondent, despite receiving a number of "short notices" from the Union regarding its pension fund contributions, made no effort to inform the Union of its unilateral action until Petrella initiated the conversation with Kaufman in May or June 1995, and Kaufman told him that the Respondent had not made pension payments for the LPNs.[11] Even if the conversation putting the Union on notice occurred at the beginning of May, the October 19, 1995 charge would be timely under Section 10(b).

We also note that, as Petrella testified, the pension fund frequently received payments from its many contributing employers in amounts less than the respective employer actually owed. The fund, in the Respondent's case, had not received any monthly contributions from the Respondent for many years due to the pension moratorium and protracted litigation between the parties that finally was settled in May 1991. The fund's lack of experience in receiving monthly pension fund contributions from the Respondent likely hindered its ability to detect the source of the Respondent's deficient contributions.

The Board stated in *A & L Underground*, 302 NLRB at 469, that an unfair labor practice charge will not be time-barred if the "delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct by the other party." Based on the totality of the evidence, we conclude that the situation here was, at the least, sufficiently ambiguous as to whether the Union had "clear and unequivocal notice" before mid-1995 that the Respondent was unlawfully failing to make pension contributions for its LPNs. We therefore find that the Union's October 1995 charge was sufficient to put at issue here all the pension contributions that the Respondent has failed to make since the moratorium ended.[12] Accordingly, we shall require the Respondent to make all pension fund contributions for its LPNs that are owed since June 1, 1994.[13] We shall also direct the Respondent to submit revised fund reports with respect to the pension contributions that the Respondent unlawfully failed to make on its LPNs' behalf so that the Union can correlate the reports with the fund payments made pursuant to the Board's Order.

3. The Respondent has excepted, inter alia, to the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to submit monthly reports to the Union's education, pension, and welfare funds as required by the parties' collective-bargaining agreement. We note, as did the judge, that the complaint does not allege that the Respondent had failed to remit reports to the Union's education fund. Regarding the pension and welfare funds, Petrella specifically testified

[8] See, e.g., *P & C Lighting Center*, 301 NLRB 828 (1991); *Burgess Construction*, 227 NLRB 765, 766 (1974), enfd. 596 F.2d 378, 382 (9th Cir. 1979).

[9] See *A & L Underground*, 302 NLRB 467, 469 (1991).

[10] We do not find that H.B.'s November 1994 filing of the unit clarification petition was sufficient to constitute such notice as the Respondent was acting at its peril in terminating pension contributions for the LPNs during the pendency of the unit clarification petition. See *Pilot Freight Carriers*, 221 NLRB 1026, 1028 (1975), revd. on other grounds 558 F.2d 205 (3d Cir. 1977). Thus, the pendency of the unit clarification petition was insufficient to permit the Respondent to abrogate contract terms as they applied to the LPNs and the Union would not have had cause to suspect that the Respondent would cease pension contributions based on the filing of the petition.

[11] We note that the Respondent's continuation of welfare payments on these employees' behalf may also have contributed to the Union's inability to discern the cause of the payment shortage.

[12] See *Allied Products Corp.,* 230 NLRB 858 (1977), enfd. 629 F.2d 1167 (6th Cir. 1980); *Truck & Dock Services,* 272 NLRB 592 (1984). We find that the judge's reliance on *John Morrell & Co.*, 304 NLRB 896, 899 (1991), enfd. 998 F.2d 7 (D.C. Cir. 1993), for a contrary result is misplaced because the union in that case had sufficient notice of the employer's unlawful conduct more than 6 months before the union requested reinstatement of the unfair labor practice charge that it previously had withdrawn.

[13] Although we note that the complaint alleged that the violation occurred in October 1994, we are not precluded from finding that the Respondent owes these contributions for the period beginning in June 1994 to date because the timing of the violation was a matter fully litigated at the hearing. See generally *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).

Nevertheless, there is some confusion on the record as to whether the Respondent's obligation to make pension fund payments on the LPNs' behalf began in June or July 1994. The Union seeks these fund contributions beginning in June and Petrella's testimony that the moratorium ended in May supports this position. On the other hand, the General Counsel argues that the Respondent's fund contribution obligation began in July 1994 and the first "short notice" letter that the Union sent in October 1994 stating that the underpayment was for the prevous "July" supports the General Counsel's position. We shall allow the Respondent to establish during compliance that its pension fund obligation did not begin until July.

that the Respondent had submitted all required reports to both funds. We therefore conclude, based on Petrella's testimony, that the General Counsel has failed to establish that the Respondent violated the Act by failing to submit remittance reports. We shall amend the judge's conclusions of law to delete this violation from those included there.[14]

AMENDED CONCLUSION OF LAW

1. Substitute the following for the judge's Conclusion of Law 4.

"4. By failing and refusing to make contributions to the Union's three trust funds for the periods specified below, the Respondent has violated Section 8(a)(5) and (1) of the Act:

*Welfare Fund*: Balance due for the month of January 1996, and all contributions due since February 1, 1996.

*Pension Fund*: All contributions due since June 1, 1995, excepting the Respondent's licensed practical nurses for whom contributions are due since June 1, 1994.

*Education Fund*: All contributions due since October 1, 1995."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Marvin Neiman, Individually, and d/b/a Concourse Nursing Home and its Alter Ego CNH Management Associates, Inc. and its Alter Ego Concourse Rehabilitation and Nursing Center, Inc., Bronx, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Failing and refusing to make contributions to the Union's three trust funds for the periods specified below:

*Welfare Fund*: Balance due for the month of January 1996, and all contributions due since February 1, 1996.

*Pension Fund*: All contributions due since June 1, 1995, excepting the Respondent's licensed practical nurses for whom contributions are due since June 1, 1994.

*Education Fund*: All contributions due since October 1, 1995."

2. Substitute the following for paragraph 2(b):

"(b) Pay those contributions into the Union's Welfare Fund, Pension Fund, and Education Fund that it failed to make on the unit employees' behalf as specified above."

3. Substitute the attached notice for that of the administrative law judge.

MEMBER BRAME, dissenting in part.

I agree with my colleagues and the judge that the various respondents in this proceeding, collectively referred to as the Respondent, are alter egos and a single employer, and that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union and by failing and refusing to remit contributions to the Union's trust funds for the periods the judge specified. I join my colleagues in finding, contrary to the judge, that the Respondent did not violate Section 8(a)(5) and (1) of the Act by allegedly failing to submit remittance reports to the Union's pension, welfare, and education funds for the reasons stated in the majority opinion.[1] I also join the majority in reversing the judge's finding that Marvin Neiman is individually liable for periods after he incorporated Concourse Rehabilitation and Nursing Center (CRNC) as the owner and operator of the nursing home involved here. However, I dissent from my colleagues' reversal of the judge and their finding that extends the time for which the LPNs are owed pension contributions.

Regarding the issue of the Respondent's pension fund contributions for the LPNs, I note the following: based on the terms of the parties' 1991–1994 collective-bargaining agreement, the Respondent had no obligation to make contributions to the Union's pension fund on behalf of its employees until June or July 1994.[2] The following October, the Respondent sent a check to this fund that purportedly covered its June pension fund contributions. It is undisputed that the Respondent's October payment, as well as its contributions for all subsequent months until it ceased making these payments for periods after June 1995, were in amounts less than the fund should have received based on the monthly remittance reports that the Respondent submitted together with its checks. Also, on November 8, H.B., the Respondent's agent, filed a unit clarification petition with the Board seeking to exclude the LPNs from the bargaining unit as statutory supervisors.

Despite the persistent shortage in the Respondent's fund payments, the Union's pension fund never contacted the Respondent in order to inquire about the pension fund deficiencies. The fund merely sent letters each month beginning in October that notified the Respondent that its pension contributions were deficient. It was not until May or June 1995 that the pension fund's administrator, Anthony Petrella, contacted Aaron Kaufman, the Respondent's agent, to inquire about the payment shortages. During this conversation, Kaufman told Petrella

[14] We direct, however, that the Respondent make these reports available for inspection so that the Union can correlate, if it so chooses, the payments it receives pursuant to the Board's Order with the reports that the Respondent previously submitted.

[1] Contrary to the majority, I would not require the Respondent to make any reports available to the Union's trust funds. The Union's pension and welfare fund administrator, Anthony Petrella, admitted that he received all these reports and the complaint does not allege that the Respondent failed to file education fund reports.

[2] All dates are in 1994, unless otherwise noted.

that the Respondent had ceased pension contributions for the LPNs who were the subject of the unit clarification petition that had been filed. It was not until October 19, 1995, that the Union filed the charge relating, inter alia, to the Respondent's failure to remit pension fund contributions for the LPNs.

Contrary to my colleagues, I would not extend the time for which the Respondent owes pension contributions for the LPNs beyond the l0(b) period. Section 10(b) of the Act states in pertinent part that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." As the Board stated in *Koppers Co.*, 163 NLRB 517 (1967), "[t]he practical effect of the proviso to Section 10(b) is that, absent the existence of a properly served charge on file, a party is assured that on any given day his liability under the Act is extinguished for any activities occurring more than 6 months prior thereto."[3]

Here, the Union began receiving monthly pension fund payments and remittance reports from the Respondent in October. Although these reports showed on their face that there were shortages in the Respondent's pension contributions, the Union took no action other than to send the Respondent a letter each month noting that the payments were deficient. It was not until May or June 1995 that the Union pursued its inquiry about the repeated shortages though Petrella's contacting Kaufman about the matter. Based on the evidence that the Respondent's monthly fund reports disclosed to the Union a deficiency in its contributions, I find that the Union was on sufficient notice before the commencement of the Section 10(b) period on April 19, 1995, to make inquiry of the Respondent. The Union, by this time, had received deficient contributions for 6 successive months and had sent the Respondent a letter each month indicating its knowledge of the situation. Based on this evidence, I find that the Union was "on notice of facts that created a suspicion sufficient to warrant requiring [it] to file [an] unfair labor practice charge . . ." in order to toll the 10(b) period.[4] Yet, the Union did not file the charge alleging this violation until more than 6 months later in October.[5]

Thus, I conclude that the Union is chargeable with knowledge of the Respondent's conduct. This is not a case where information regarding misconduct was only in the employer's hands, or where an employer has concealed its misconduct. The Union had notice of the Respondent's shortfall in pension contributions from the remittance reports it received and had ignored these reoccurring deficiencies for months. Accordingly, I would not extend the time for which the Respondent owes pension fund contributions for the LPNs beyond the 10(b) period.

[3] See also *Winer Motors*, 265 NLRB 1457 (1982); *Machinists District Lodge 64 v. NLRB (Brown & Sharpe Mfg. Co.)*, 949 F.2d 441, 445 (D.C. Cir. 1991).

[4] *Safety-Kleen Corp.*, 279 NLRB 1117 fn. 1 (1986). *Electrical Workers IBEW Local 25 (SMG)*, 321 NLRB 498, 500 (1996), and cases cited therein. (Cause of action begins from time of actual or *constructive* notice of the commission of alleged unfair labor practice.)

[5] Moreover, I note that the filing of the petition in November seeking to exclude the LPNs from the bargaining unit also provided cause for the Union to make an inquiry as to whether the Respondent may have unilaterally ceased pension contributions for these employees. I recognize, however, that the filing of the petition did not automatically relieve the Respondent of its responsibility for making these contributions.

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to make contributions to the Union's three trust funds for the periods specified below:

*Welfare Fund*: Balance due for the month of January 1996, and all contributions due since February 1, 1996.

*Pension Fund*: All contributions due since June 1, 1995, excepting the Respondent's licensed practical nurses for whom contributions are due since June 1, 1994.

*Education Fund*: All contributions due since October 1, 1995.

WE WILL NOT fail and refuse to bargain collectively by failing to meet and bargain with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All service employees, including nurses' aides, orderlies, recreation aides, therapy aides, dietary and kitchen employees, laundry employees, and licensed practical nurses.

WE WILL pay those contributions into the Union's Welfare Fund, Pension Fund, and Education Fund that we failed to make on the unit employees' behalf as specified above.

WE WILL make whole, with interest, the unit employees for any losses they sustained by reason of our unlawful failure to make payments to the Union's Funds.

MARVIN NEIMAN, INDIVIDUALLY, AND D/B/A CONCOURSE NURSING HOME AND ITS ALTER EGO CNH MANAGEMENT ASSOCIATES, INC., AND ITS ALTER EGO CONCOURSE REHABILITATION AND CENTER, INC.

*Mindy Landow, Esq.,* for the General Counsel.
*Theodore Mairanz* and *Marvin Neiman, Esqs. (Neiman Ginsburg & Mairanz P.C.),* of New York, New York, for the Respondents.
*Irwin Bluestein* and *Linda Rodd, Esqs. (Vladeck, Waldman, Elias & Engelhard, P.C.)* of New York, New York, for the Union.

## DECISION

### STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based upon a charge and an amended charge in Case 2–CA–28638 filed on August 2, 1995, and February 9, 1996, respectively by Local 144, Service Employees International Union, AFL–CIO (the Union), and a charge and a first amended charge in Case 2–CA–28776 filed by the Union on September 25, 1995, and February 9, 1996, respectively, and a charge and a first amended charge in Case 2–CA–28777 filed by the Union on September, 27, 1995, and February 9, 1996, respectively, and a charge and a first amended charge in Case 2–CA–28778 filed by the Union on September 25, 1995, and February 9, 1996, respectively, and a charge and a first amended charge in Case 2–CA–28841 filed by the Union on October 19, 1995, and February 9, 1996, a consolidated complaint was issued by Region 2 of the Board on February 29, 1996.[1]

The complaint, which was issued against Marvin Neiman, individually, and d/b/a Concourse Nursing Home and its alter ego CNH Management Associates, Inc. (CNH) and its alter ego Concourse Rehabilitation and Nursing Center, Inc. (CRNC) (Respondent) alleges violations of Section 8(a)(1) and (5), in that Respondent failed and refused to bargain with the Union, and failed to remit funds and make reports to the Union's Welfare Fund, Pension Fund, and failed to remit funds to the Education Fund.

Respondent's answer denied the material allegations of the complaint, and set forth certain affirmative defenses. On May 28 through 31, June 3, 10, 27, and July 2, 1996, a hearing was held before me in New York City.

On the evidence presented in this proceeding, and my observation of the demeanor of the witnesses, and after consideration of the briefs filed by all parties, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

A facility, sometimes known as Concourse Nursing Home, operates as a 240-bed nursing home located at 1072 Grand Concourse, Bronx, New York. It was stipulated that Marvin Neiman doing business as Concourse Nursing Home derives gross revenue in excess of $500,000, and annually purchases and receives at its New York facility goods and materials in excess of $5000 directly from points outside New York State.

It was also stipulated that Concourse Rehabilitation and Nursing Center, Inc., annually, in the conduct of its business in the operation of the nursing home, derives gross revenues in excess of $500,000, and annually purchases and receives at its New York facility goods and materials valued in excess of $5000 directly from points outside New York State.

I accordingly find and conclude that Marvin Neiman, doing business as Concourse Nursing Home, and that Concourse Rehabilitation and Nursing Center, Inc., are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[2]

Respondent denied the labor organization status of the Union. Certain employees employed at the nursing home are represented by the Union, and Marvin Neiman, doing business as Concourse Nursing Home entered into a collective-bargaining agreement with the Union in 1991. The Union, which has represented these employees with respect to collective-bargaining and grievance-arbitration proceedings, has been certified numerous times by the Board in the past. I find that it is a labor organization within the meaning of Section 2(5) of the Act.

#### II. THE ALLEGED UNFAIR LABOR PRACTICES

##### *A. The Ownership and Operation of the Nursing Home*

Briefly stated, the owners of the nursing home were Marvin Neiman, as a sole proprietor, and then in October 1995, Concourse Rehabilitation and Nursing Center.

The purported operators of the nursing home were CNH Management Associates, Inc., which allegedly employed the employees of the facility from 1978 to 1991, and then H.B. Management Services Corp.

In order to fully understand the relationships between the various entities herein, it is necessary to discuss the early operation of the nursing home.

The nursing home was originally owned by the father in law of Marvin Neiman (Neiman). From 1974 until October, 1995, Neiman owned the home, operating it as a sole proprietorship.[3]

[1] The answer denies knowledge that the charges and amended charges were filed and served as alleged. A review of the formal papers, including the postal return receipts establishes that the charges and amended charges were properly filed and served. Each of the original charges was served on "Concourse Nursing Home. Att: Marvin Neiman." Each of the first amended charges was served upon "Marvin Neiman, individually, and d/b/a Concourse Nursing Home and its alter ego CNH Management Associates, Inc., and its alter ego Concourse Rehabilitation and Nursing Center. Att: Marvin Neiman."

In this connection, I reject Respondent's argument that the complaint must be dismissed against CNH and CRNC because separate service of the charges or complaint was not made upon those entities. As discussed, infra, I find that CNH and CRNC are alter egos and a single employer with Marvin Neiman and Concourse Nursing Home, which had been served. Moreover, all entities are at the same location. Service upon one of the entities which is a single employer and alter ego constitutes service upon another. *Il Progresso Italo Americano Publishing Co*., 299 NLRB 270 fn. 4 (1990); *Mid-Hudson Leather Goods Co*., 291 NLRB 449, 453 (1988).

[2] Respondent has stipulated to the monetary figures, but denies that the entities mentioned above are employers of the employees employed at the nursing home. This will be discussed, infra.

[3] Certain of these facts appear in the opinion of Robert Sweet, U.S. District Judge. *Local 144 v. C.N.H. Management Associates, Inc*., 752 F.Supp. 1195 (S.D.N.Y. 1990). The General Counsel requested that I take judicial notice of Judge Sweet's opinion. It is appropriate that I do so. *Lord Jim's*, 259 NLRB 1162, 1163 (1982); *Vanella Buick Opel*, 194 NLRB 744, 747 (1971).

CNH Management Associates, Inc. (CNH) became incorporated on August 10, 1978, on which day Neiman transferred all stock in the company to his wife Helen Neiman to hold in trust for their children. According to Judge Sweet's opinion, "effective that date, all former employees of Concourse became employees of CNH." 752 F.Supp at 1199. Judge Sweet also found that CNH " is a management company providing labor services to Concourse."

Also on that date, CNH and the Union signed their first collective-bargaining agreement for the above employees. The bargaining unit, in which the Union represents the employees, is as follows:

> All service employees, including nurses' aides, orderlies, recreation aides, therapy aides, dietary and kitchen employees, laundry employees, and licensed practical nurses.

In 1984, Jonathan Baine purchased CNH for $260,000, which represented the retained earnings of CNH as of the end of that year, which was also the amount on CNH's books as due from Concourse. The $260,000 purchase price was effected by a transfer from Concourse's bank account to an account entitled "Marvin Neiman, Helen Neiman escrow account." Judge Sweet found that after the transfer, "Neiman and his wife continued to direct the day to day operations of CNH," and "Neiman continued to control CNH's labor relations, determining personnel policies, the implementation of wage increases, the award of bonuses, and the payment of arbitral awards." 752 F.Supp at 1202, 1203. Baine signed the payroll checks of CNH.

At the time the 1978 collective-bargaining agreement was entered into, the employees at Concourse received lower wages and benefits than those received by employees represented by the Union elsewhere. Accordingly, the contract required Concourse to increase employee wages and benefits to industry levels, called parity payments. When Concourse did not do so, the Union filed for arbitration. Following lengthy proceedings, the arbitrator decided that CNH was required to make the parity payments.[4] The Union sued to confirm and enforce the arbitrator's award. The litigation encompassed many years. In the interim, in 1981, the Union and CNH entered into a successor collective-bargaining agreement.

In May 1991, the parties reached a settlement of the lawsuit, pursuant to which CNH and "Marvin Neiman individually and as the sole proprietor of Concourse Nursing Home" and the Union agreed that Neiman would execute a collective-bargaining agreement covering the employees employed at the nursing home.

In July 1991, a contract was entered into between "Marvin Neiman d/b/a Concourse Nursing Home" and the Union.[5] The contract prohibits the subcontracting of unit work, and provides that it is binding upon any successor or transferee who takes over the ownership, operation and/or management of the facility covered by the contract.[6] The contract further provides that such transferee must be approved by the Department of Health as the licensed operator, and the transferee must agree to employ all the employees covered by the contract, and to adopt the contract and comply with all its terms, and that Neiman was obligated to ensure that the transferee does so.

CNH was apparently purchased by the Baine family, who operated it until 1991, at which time everyone who worked for CNH became employed by H.B. Management Services Corporation. Georgine McCabe, who at the time was the director of resident care services, testified that when her employment changed from CNH to H.B., she was not interviewed by H.B., she received no additional duties, and there was no change in her salary or benefits. She continued to report directly to Mrs. Neiman, who was at the time the administrator of the home.

In July 1995, H.B. was sold by Barbara Baine for $100 to Aaron Kaufman, who is the sole owner and officer. Prior to Kaufman's ownership of H.B., he was employed by CNH as comptroller for Concourse. He has continued as comptroller for the facility. Kaufman works at Concourse, sharing an office with other members of the accounting department. His immediate supervisor during his entire tenure has been Mrs. Neiman, but he also reports to Neiman.

H.B. has as its sole customer, the Concourse facility. It operates from Concourse's premises, its telephone and fax numbers are the same as Concourse's, and it uses Concourse's equipment and office space without reimbursing it. There is no written agreement between H.B. and CRNC or its predecessor Concourse Nursing Home.

H.B. has no operating license from New York State to operate a nursing home.

Respondent argues that H.B. is the employer of the employees employed at the facility. H.B. issues payroll checks to the workers covered by the collective-bargaining agreement, and it submits invoices to the facility for all its expenditures, such as expenses relating to labor, including salaries and taxes, and it receives reimbursement for those invoices.

Kaufman stated that he generally does not meet with Union representatives as part of his responsibility to adjust grievances. However, he has met with the Union for a collective-bargaining session, which will be discussed, infra.

Kaufman did not know if any H.B. employee receives an annual review. He stated that he has full authority over the salaries of McCabe, department heads and employees of H.B. He implemented wage increases pursuant to the 1991 collective-bargaining agreement, and advised Mr. and Mrs. Neiman and McCabe that he was doing so.

### *B. The Formation of CRNC*

In November 1994, Neiman submitted an application to the Department of Health, in which he proposed to change the form of the ownership of the facility from a sole proprietorship to a corporation, to be known as Concourse Rehabilitation and Nursing Center, Inc. He stated that "in all other respects it is not contemplated that there will be any change in the manner of the operation or the services to be provided." The application's project narrative included its philosophy of care: "The Concourse Nursing Home's current and historical philosophy of care guides and underscores its commitment to . . . guide the work force. . . . This philosophy stands and has been proven as evidenced by deficiency-free surveys, financial viability and long-standing employees." One schedule contained in the application lists the classifications of bargaining unit employees, ostensibly employed by H.B., and their salaries and benefits under the heading Concourse Rehabilitation & Nursing Center, Inc. wages and benefits. Also listed under the same CRNC

[4] To accomplish this, Neiman would have had to transfer the funds to CNH. 752 F.Supp at 1201.

[5] There is no support in the record for Neiman's testimony that although he signed the contract, all parties and Judge Sweet were informed that he did not intend to implement or honor it because Concourse Nursing Home had no employees.

[6] A side agreement was entered into permitting the subcontracting of recreation and therapy aides.

heading are the wages and benefits for H.B. employees such as McCabe, Kaufman, Henry Teitelbaum, the director of operations and personnel.

Nowhere in the application or attachments is any mention of H.B. as the employer of the employees at the facility, or CRNC's connection or involvement with H.B.

Neiman's application was approved, CRNC was incorporated in September, 1995, and it became the owner and operator of the facility in October 1995.

*C. Evidence Concerning the Employer of the Employees*

1. Respondent's evidence

Respondent argues that H.B. is a "separate entity which has no relation to either CRNC or Neiman's sole proprietorship other than a business relation to provide employees to the Concourse Nursing Home and to the corporation."

It is Respondent's position that H.B. was at all times in charge of the day-to-day labor relations of its employees, including the hire and fire of workers. It is its further position that Concourse Nursing Home subcontracted the provision of employees for the facility to CNH and then to H.B., and that Concourse Nursing Home and CRNC have no employees.

Respondent relies upon the following evidence, inter alia, in support of its position that H.B. is the employer of the employees.

The Union dealt with CNH regarding grievances of the employees represented by the Union.

At an arbitration hearing concerning employees Elaine Clarke and Mercilyn Byrd, Jonathan Sulds, the attorney for H.B., represented the company, and stated that H.B. was the employer. The Union's lawyer objected. the arbitrator did not rule on the issue of the identity of the employer, but issued a decision on the merits, with Concourse Nursing Home being named in the caption, and reference being made to the contract, which was with Concourse.

On November 8, 1994, H.B. filed a unit clarification petition with the Board, seeking to exclude the licensed practical nurses from the unit on the ground that they are supervisors. The Union moved to dismiss the petition on the ground that Concourse Nursing Home and not H.B. is not the employer of the employees.

An arbitration award was issued in May 1995, which listed as the employer H.B. Management Services Corp. at Concourse Nursing Home. The dispute involved the claim that "the Employer violated the parties' 1991–1994 agreement" concerning the grievant, employee Elaine Leander.

In addition, in 1993, the American Arbitration Association sent letters to Sulds, as attorney for H.B. at Concourse Nursing Home, referring to certain disputes between the parties to the contract.

The Union settled a grievance, which was brought against Concourse Nursing Home. In that grievance, which involved employee Fitzroy Caines, Union official Vanato Francis signed a stipulation of settlement which stated that "H.B. Management employs the Grievant to perform services for Concourse, is responsible for the supervision of the Grievant's employment, is in control of all operations at Concourse. . . ."

The Union and its law firm also participated in an arbitration concerning employee Elaine Leander, in which the employer was set forth as "H.B. Management Services Corp. at Concourse Nursing Home" in which the issue was the "employer's" violation of the parties' 1991–1994 collective-bargaining agreement.

Payroll checks for the employees have been issued since 1991 in the name of H.B., and memoranda to employees have been written on H.B. letterhead since 1991, dealing with such matters as wages and discipline. However, checks were issued to the Union Funds in 1992 through 1994 from checks bearing the account name of Concourse Nursing Home.

2. General Counsel's evidence

Notwithstanding that H.B. is claimed to be the employer of the employees since 1991, there is much evidence in the record which refutes this claim.

A June 1992 nurse's aide/orderly evaluation form which gave a failing grade to an orderly, and an August 1992 inservice education department unit orientation form for the same orderly, and numerous other 1992 inservice documents have Concourse Nursing Home as their heading. Similarly, 1992, 1993, and 1996 disciplinary action notices are under the heading CNH.

In addition, a 1996 letter advising an employee of the requirement that she take a physical examination, and the physical examination form is on CRNC letterhead. Similarly, a 1992 report of an investigation of an incident or accident was set forth on a Concourse Nursing Home letterhead.

Although ostensibly an employee of H.B. at the time, Helen Neiman, the administrator of the facility, had listed on a 1994 application for a bank loan, that her employer was Concourse Nursing Home.

In December 1991, the Union's Funds received a check from H.B. in payment of certain fund contributions. Anthony Petrella, the Funds' controller, objected to H.B. making the payment, and comptroller Kaufman sent a Concourse Nursing Home check to replace the H.B. check. That month, Kaufman sent a letter to Petrella advising that the "H.B. Management Services reports accompanying the fund contribution checks are for the employees who work at Concourse Nursing Home."

At that time, a stipulation was entered into between the parties and Judge Sweet, in which it was agreed (a) that Neiman was obligated under the collective-bargaining agreement to make contributions to the Local 144 Hospital Welfare Fund and (b) Neiman shall, in his own name, or doing business as Concourse Nursing Home, and not through any other entity, make all contributions and submit all forms to the Local 144 Hospital Funds required under the agreement. The stipulation also contained a provision that the Union could pursue an application before the court concerning Neiman's "continued use of and/or relationship with H.B. Management Associates, Inc. or any other entity."

The Personnel Policies Manual bears CRNC as the page heading on numerous policy statements for the employees at the facility, including those relating to hire, wages, discipline, etc. Various documents throughout the Manual, however, state that "Concourse Nursing Home" is the employer. The Code of Ethics for Employee Relations states that Concourse Nursing Home, in order to protect the interests of its employees, pledges itself to maintain written policies and procedures affecting the rights and privileges of its employees, pay salaries, to establish the standards of work performance and behavior on the job, will not discriminate in the hiring of candidates and treatment of employees on the basis of handicap, etc.

An employee orientation policy specifically applies to "all personnel employed by the Concourse Nursing Home" and it is a guide to be used in on the job orientation of employees.

A separate booklet entitled *The Governing Body* identifies the governing body as being comprised of Mr. and Mrs. Neiman, as the operator and executive director, respectively. It is the responsibility of the Governing Body to appoint a qualified administrator, implement and maintain, through the administrator, written personnel policies and procedures, provide for an ongoing educational program for the staff.

Nursing homes are required to abide by Title 10 of the New York Code concerning the operation of such facilities. According to Title 10, the governing authority or operator is the party responsible for the operation of the nursing home. In this case, the governing authority, as defined in the Regulations, are the "officers, directors and stockholders of a business corporation" which is CRNC, and Neiman as the stockholder. According to the Regulations, "the governing authority or operator may not contract for management services with a party which has not received establishment approval."

One factor set forth for determining whether there has been an improper delegation to a management consultant by the governing authority or operator of its responsibilities is the "authority to hire or fire the administrator or other key management employees."

Neiman was examined as to who has the authority to discharge administrator McCabe. He first testified that since McCabe was not an employee of CRNC, but rather is an employee of H.B., Kaufman or a principal of H.B. would have authority to discharge her, and that he (Neiman) did not have the authority to tell McCabe that she was fired. Neiman stated that his only alternative, if he was unhappy with the services rendered by McCabe, would be discontinue his contract with H.B..

Neiman later testified, however, after being confronted with the rule, above, that the authority to hire and fire the administrator cannot be, and had not been delegated to H.B., rather that H.B. could only suggest that such action be taken, but he (Neiman) may accept or reject that suggestion because of the rule's requirement. He stated that the license of the nursing home is a very valuable asset. He then flatly stated that the ultimate authority to hire or fire the administrator rests with the corporation, CRNC. But then Neiman further testified that he could not fire the administrator as she did not work for him, and reiterated that H.B. has the authority to hire or fire the administrator. Neiman also stated that H.B. retains the "technical" authority to hire or fire the administrator and other key management employees.

### 3. The failure to bargain with the Union for a successor agreement

The complaint alleges that since about July 25, 1995, Respondent, by representatives of H.B. (a) asserted that the Respondent was not the employer of the employees in the bargaining unit; (b) failed and refused to bargain with the Union for a successor collective-bargaining agreement; and (c) by those acts withdrew its recognition of the Union.

The collective-bargaining agreement expired on September 30, 1994. On June 20, 1994, Union President Frank Russo sent a letter to the "administrator, Concourse Nursing Home", asking for an opportunity to meet and negotiate a successor agreement.

On June 28, Vancito Francis, the Union's business representative, sent a letter to McCabe, listing seven employees as members of the negotiating committee. Francis attempted many times to contact H.B. attorney Sulds, who told him that "there was some reluctance on [Mr. Neiman's] part." Francis contacted McCabe who said that she would speak with Sulds.

Francis asked retired Union Business Agent Murray Nomberg for assistance in arranging a negotiation session. Nomberg called Sulds and the parties agreed to meet on July 25, 1995. At the meeting, Francis presented the Union's bargaining proposals, which were entitled "Local 144, Contract proposals 1994, Concourse Nursing Home." Sulds replied that since the proposals were titled "Concourse Nursing Home," and he only represented H.B., the employer of the employees, he had no authority to accept the proposals. Sulds said that H.B. was prepared to bargain for a contract. Francis replied that he only had authority to bargain with Concourse Nursing Home, the contracting party. The meeting then ended.

Sulds testified that prior to meeting with the Union on that occasion, he spoke with CRNC'S attorney Mairanz concerning background information, and for help drafting proposals for H.B, and after the meeting he spoke with Neiman and Mairanz concerning what occurred there.

No further meetings have been held concerning contract negotiations.

### 4. The failure to remit funds and reports

The complaint alleges that Respondent's failure to make monthly contributions to the Union's Welfare Fund, Pension Fund, and Education Fund, and failure to remit reports to the Welfare and Pension Funds, violates the Act. The complaint further alleges that Respondent's failure to make the contributions and remit the reports was done unilaterally without prior notice to the Union and without having given the Union an opportunity to negotiate and bargain concerning such acts.

Article 25 of the collective-bargaining agreement requires monthly payments and reports to the Local 144 Hospital Welfare Fund, the Local 144 Hospital Pension Fund, and the Local 144 Health Facilities Training and Upgrading Fund.

Regarding the Welfare Fund, the complaint alleges that payments and reports were not made to the Welfare Fund since August 1995. Union Funds Controller Anthony Petrella testified that as of the time of the hearing, the facility owes contributions from January 1996 through April 1996. Although weekly "on-account" payments of $5000 have been received, such sums have not equaled the amount owed.

Regarding the Pension Fund, the complaint alleges that since about October 1994, but fraudulently concealed from the Union since about June 1995, payments have not been made to the Pension Fund on behalf of licensed practical nurses. The complaint also alleges that since July 1995, payments and reports have not been made to the Pension Fund in behalf of all unit employees including licensed practical nurses.

Petrella testified that the Funds first received a payment for the Pension Fund in October 1994 for the period which was due in July 1994. He sent a letter to Concourse Nursing Home in October, noting an underpayment. Payments were made by the facility, but not the full amount was remitted for the periods due. Letters notifying Concourse and CNH of the underpayments were sent nearly monthly from October 1994 through September 1995.

In May or June 1995, Petrella called Aaron Kaufman and told him that there was an underpayment in Pension Fund con-

tributions based upon the amount of reported wages. Kaufman informed Petrella that no contributions were being made for the licensed practical nurses. Petrella expressed surprise, saying that the Fund was receiving welfare contributions for those nurses. Kaufman replied that he filed a "petition" regarding the licensed practical nurses. As noted above, a unit clarification petition was filed by H.B. in November 1994, seeking the exclusion of the licensed practical nurses from the unit.

Petrella testified that July 20, 1995, was the last time the facility made any payments toward pension contributions. However, he also testified that reports had been made for the Pension and Welfare funds, although not always timely.

Finally, the complaint alleges that since about June 1995, payments have not been made to the Education Fund. It is not alleged that Respondent failed to submit reports to the Education Fund.

Boliver Valentine, the assistant director of finance of the Local 144 Health and Hospital Education Fund, testified that that fund is the successor to the Local 144 Health Facilities Training and Upgrading Fund.

In June 1995, Kaufman sent Union Controller Petrella a letter, on H.B. letterhead, which stated that he understood that the Training and Upgrading Fund was terminated, and the Education Fund has been established. Kaufman added "we hereby acknowledge that Education Fund contributions made on behalf of bargaining unit employees of H.B. Management Services Corp. will be accepted by the Hospital Education Fund and that such bargaining unit employees will be entitled to benefits from such Fund according to the rules and regulations of the Fund."

Valentine stated that as of the time of the hearing, contributions for that Fund have not been submitted since October 1995, and reports had not been submitted since September 1995. In April 1996, Valentine told Kaufman that contributions to the Education Fund were outstanding. Kaufman asked for a list of the delinquent months, and on April 26, Valentine sent him a list which stated that contributions for the months of May 1995, and October 1995 through March 1996 had not been received. Valentine called Kaufman on May 1, 1996, and was told that Kaufman would call him back. He has not done so.

Regarding the Education Fund, as set forth above, the collective-bargaining agreement referred to its predecessor, the Training and Upgrading Fund. Respondent argues that since Concourse and Neiman did not sign an acknowledgment agreeing to the change of name of the funds, they are not responsible to make such payments. H.B. did agree to the change of name of the fund, and agreed to make payments to such fund.

Inasmuch as I have found that H.B. is the agent of Respondent, I find that its actions in agreeing to make payments to the Education Fund were made in behalf of Respondent, and accordingly Respondent remains responsible to continue to make contributions to the Fund.

## III. ANALYSIS AND DISCUSSION

### *A. The Alter Ego Status of Neiman, Concourse, CNH and CRNC*

The complaint alleges that Marvin Neiman individually and d/b/a Concourse Nursing Home, CNH, and CRNC are alter egos and a single employer.

Alter ego status is found where two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership. *Johnstown Corp.,* 313 NLRB 170 (1993); *Crawford Door Sales*, 226 NLRB 1144 (1976).

First, with respect to the ownership of the facility, Marvin Neiman initially owned the facility as a sole proprietorship, and then incorporated, with CRNC being formed, and with him being the sole stockholder. Clearly the ownership in the facility is identical—it at all times resided in Neiman. The top management of the facility remained the same. Regardless of whether the managers, including Mrs. Neiman, Kaufman, Teitelbaum or McCabe are on H.B.'s payroll or not, which will be discussed, infra, the highest management officials at the facility remained in the same positions, performing the same functions, as they had previously.

Of course the business purpose, the operation of a 240-bed nursing home at the same location, and its customers, the patients, remain the same between Concourse Nursing Home and CRNC.

The supervision of the employees, regardless of whether the supervisors or the employees are allegedly employed by H.B., remains the same. The same supervisory evaluation and discipline forms have been used, and indeed prior forms using the names of Concourse Nursing Home and CNH have been used even while H.B. was the purported employer.

Neiman was named as an alter ego individually, and as doing business as Concourse Nursing Home. Neiman's control of the other entities was pervasive, even after CRNC became the corporate owner of the nursing home. Thus, his testimony with regard to H.B.'s authority to remove administrator McCabe was instructive. As set forth above, Neiman gave differing views as to whether he had authority to discharge McCabe or whether H.B. did. Although separate and independent in legal form, CRNC does not operate as a discrete, distinct entity in its ownership of the nursing home. It is clear that Neiman still is in effective control of the home and all its operations.

In addition, all the unfair labor practices found herein were committed when Neiman operated the nursing home as a sole proprietor.

On the facts set forth above, I find that Neiman and CRNC are alter egos. As an alter ego, Neiman is individually responsible for the obligations of his alter egos, and is jointly and severally responsible with the other Respondents for remedying the unfair labor practices found herein. *Urban Laboratories*, 308 NLRB 816, 818 (1992); *Pollack Mfg*., 313 NLRB 562, 568 (1993).[7]

I accordingly find and conclude that CRNC is the alter ego of Marvin Neiman individually and d/b/a Concourse Nursing Home.

I also find that CNH was the alter ego of Neiman and Concourse Nursing Home during the life of CNH. As found above, CNH was purchased by the Baine family from Neiman, but Neiman and his wife continued to operate the facility and were in overall charge of its employees. Accordingly, although it was the nominal employer of the employees, CNH was in reality the alter ego of Marvin Neiman and Marvin Neiman d/b/a Concourse Nursing Home.

The Board examines the following factors in determining whether two or more employing entities constitute a single

[7] In view of this finding, I find it unnecessary to discuss General Counsel's request that I pierce the corporate veil of CRNC and find Neiman individually responsible under that theory. *White Oak Coal Co*., 318 NLRB 732, 734 (1995).

employer: (1) common ownership; (2) interrelation of operations; (3) common management; and (4) centralized control of labor relations. Not all of these criteria must be present to establish single-employer status, and a significant factor is the absence of an "arm's length relationship found among unintegrated companies." *Denart Coal Co.,* 315 NLRB 850, 851 (1994). Based on the facts set forth above with respect to alter ego status, I find that the same companies constitute a single employer.

*B. The Agency Status of H.B.*

The complaint alleges, and I find that H.B. is the agent of Respondent.[8]

Here, the connection between H.B. and CRNC is close, direct, and obvious. As set forth above, H.B. is located at the Concourse facility, and uses the equipment of Concourse. H.B., which was purchased for the nominal amount of $100 by Aaron Kaufman, who had been the comptroller for Concourse and CRNC, makes no profit since all its expenses are reimbursed by the nursing home. No written agreement exists between CRNC and H.B. Its sole customer is the nursing home, and it uses telephone and fax numbers which are the same as those for Concourse.

In similar situations, the Board has found that one company is an agent of another where the agent provided temporary employees used by the respondent to perform unit work, and also provided services such as administrative paperwork, skill qualifying, interviewing, reference verification, payroll, and insurance. *Storall Mfg. Co*., 275 NLRB 220 fn. 3 (1985). See also *Mason City Dressed Beef*, 231 NLRB 735, 746 (1977); *Michigan Drywall Corp*., 232 NLRB 120, 123 (1977).

*C. Responsibility for the Unfair Labor Practices*

As set forth above, Neiman, Concourse Nursing Home, and CRNC, as alter egos, are the employer of the unit employees working at the nursing home. Neiman d/b/a Concourse Nursing Home signed the most recent collective-bargaining agreement.

It is clear that Concourse and CRNC are responsible for the employment relationship with the unit employees at the nursing home. Neiman, Concourse, and CRNC, as their alter ego, executed the collective-bargaining agreement and are responsible to honor its terms. Indeed, there was no evidence that the collective-bargaining agreement had not been complied with from its inception by Neiman and Concourse, until the time of the unfair labor practices alleged herein.

Employee evaluations, training, personnel policies, memos to employees, as well as representations to State authorities have been made in the name of Concourse Nursing Home, and CRNC, to an extent that it may be found that those entities are the employer of the employees. Although certain forms are in the name of H.B., and the employees are paid from H.B.'s account, based upon the evidence, it cannot be said that H.B. is the employer of the employees upon the evidence presented herein.

H.B. simply has been created to appear as the employer, but in fact is the employer in name only. It functions virtually as a payroll agent, making payments to the workers, and doing little more.

I have carefully considered Respondent's evidence concerning its position that H.B. is the employer of the unit employees. The evidence submitted simply does not support a finding that H.B. is the true employer. The various arbitration proceedings, the self-serving declaration in the Caines grievance, and the unit clarification petition are superficial and unsuccessful attempts to foist H.B. upon the Union. They do not constitute substantial evidence in determining the employer status of H.B. Even as to certain of the evidence produced, the collective-bargaining agreement was referred to, which of course is between Neiman individually and d/b/a Concourse Nursing Home.

The provisions sought to be enforced herein, the contributions to the funds, survived the expiration of the contract. Neiman, Concourse Nursing Home, and their alter ego, CRNC are responsible for the payment of the funds and are responsible to remedy the violations of the Act found herein.

IV. THE UNFAIR LABOR PRACTICES

*A. The Fund Contributions*

The complaint alleges, and I find, that Respondent has not made certain contributions to the Funds, as required by the collective-bargaining agreement, and that certain reports were not submitted.

Thus, as set forth above, at the time of the hearing, Respondent owed contributions to the Funds as follows:

*Welfare Fund*: Balance due for the month of January, 1996, and all contributions due since February 1, 1996.

*Pension Fund*: All contributions due since June 1, 1995.

*Education Fund*: All contributions due since October 1, 1995.

With respect to the Pension Fund, I cannot find, as alleged in the complaint, that Pension Fund contributions are due for the licensed practical nurses from October 1994, which is outside the Section 10(b) period, because of the allegedly fraudulent concealment of their nonpayment.

The Union was aware that a reduced Pension Fund payment was made, and could have learned the reason for such underpayment in a timely manner. *John Morrell & Co*., 304 NLRB 896, 899 (1991).

The Board has long held that "terms and conditions of employment that are part of an expired collective-bargaining agreement, including benefit fund plans and related reporting requirements, survive contract expiration and cannot be altered without bargaining" to impasse, the Union's loss of majority status, or a waiver. *MBC Headwear, Inc*., 315 NLRB 424 fn. 3 (1994); *Parkview Furniture Mfg. Co*., 284 NLRB 947, 971–972 (1987).

No waiver occurred since the Union did not waive any of the contributions which were due. Rather, the Union continued to insist upon their payment, and notified Respondent accordingly.

Regarding the reports allegedly not submitted, although I am aware that Petrella testified that all reports had been received, nevertheless there was some confusion concerning his testimony. Inasmuch as I have found that certain Fund contributions have not been made, it is appropriate that I direct that reports shall be submitted. In that way, the reports may be correlated with the Fund payments not made. There is no prejudice to

[8] The Union argues that H.B. is the alter ego of Concourse. Since the General Counsel has authority over the issuance of complaints, the matters alleged, and determining the legal theory involved, I reject the Union's argument. *Electrical Workers IUE Local 144 (Paramax Systems),* 311 NLRB 1031, 1033 fn. 6 (1993).

Respondent in submitting such reports since it need only submit duplicate copies of those reports which were already submitted with the payments.

I accordingly find and conclude that Respondent has failed to remit benefit fund contributions, and failed to submit remittance reports to the Union as required by the collective-bargaining agreement. Such acts were done without giving the Union any notice or an opportunity to bargain concerning such actions.

*B. The Failure to Meet and Bargain*

An alter ego is obligated to meet and bargain with the Union as the representative of the unit employees. *Lihli Fashions Corp*., 317 NLRB 163 (1995). Respondent has an obligation to meet and bargain with the Union concerning the terms of a successor collective-bargaining agreement.

As set forth above, the Union sent a letter to the administrator of the nursing home, requesting bargaining. In addition, McCabe was aware of the Union's attempts to begin bargaining.

The employer of the employees, the party to the collective-bargaining agreement, Neiman, Concourse Nursing Home, and their alter ego, CRNC, was obligated to bargain in good faith with the Union for a successor contract.

By inserting their agent H.B. into place as the purported employer, and refusing to bargain with the Union, Respondent violated the Act. The Union correctly refused to bargain with H.B., as it was not the employer of the employees. The Union was entitled to bargain with the contracting party, Neiman, Concourse Nursing Home and their alter ego, CRNC.

The Union did not waive its right to bargain with Concourse. In order to establish a waiver of the statutory right to bargain over mandatory subjects of bargaining, there must be a "clear and unmistakable relinquishment of that right." To meet that standard, the contract language must be specific, or it must be shown that the matter sought to be waived was fully discussed and consciously explored and that the waiving party consciously yielded its interest in the matter. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Trojan Yacht*, 319 NLRB 741, 742 (1995). No such waiver exists here.

Respondent argues that since Neiman ignored the Union's June 1994 request to bargain, the Union was put on notice that Respondent did not intend to bargain with it, and was therefore relieved of its obligation to bargain with it. Respondent contends that since H.B. presented itself as ready to bargain, the Union was obligated to bargain with H.B. If upheld, that argument would permit any employer to simply disregard a demand to bargain, prop up another entity, and demand that the Union bargain with that other organization. The Union had a right to demand that Respondent, the contracting party, and the true employer of the employees, bargain with it.

*C. Respondent's Section 10(b) Defenses*

Respondent argues that the complaint must be dismissed because there is no evidence that within 6 months prior to the charges being filed herein that Neiman (a) failed to bargain with the Union and (b) had any obligation to make any fund contributions or remit any reports.

Respondent contends that at least as of December 1991 the Union knew that Neiman would not implement the terms of the collective-bargaining agreement. As set forth above in footnote 5, Neiman's argument that everyone, including Judge Sweet knew that although he signed the agreement as an individual he would not be bound therefore, is devoid of merit.

Respondent relies on the stipulation executed in December 1991, as evidence that the Union was aware that Concourse would not act as the employer of the employees at the nursing home. As set forth above, the stipulation contained a provision that the Union could pursue an application before the court concerning Neiman's "continued use of and/or relationship with H.B. Management Associates, Inc. or any other entity." But the stipulation also provided that it was agreed (a) that Neiman was obligated under the collective-bargaining agreement to make contributions to the Local 144 Hospital Welfare Fund and (b) Neiman shall, in his own name, or doing business as Concourse Nursing Home, and not through any other entity, make all contributions and submit all forms to the Local 144 Hospital Funds required under the agreement.

Respondent argues that since the Union never made any application concerning Neiman's continued use or relationship with H.B., it therefore waived "any rights" it possessed. As set forth above, the Union did not, by action, or implicitly, waive its right to insist that Respondent was the employer of the unit employees. The Union was not required to take any action concerning Neiman's relationship with H.B. It already had Neiman's signature on the collective-bargaining agreement, and on this Stipulation obligating himself to make the required contributions.

Respondent correctly argues that H.B.'s name appeared on certain arbitrations which the Union was a party to, and on the unit clarification petition. However, these facts do not constitute the "clear and unequivocal repudiation" of the collective-bargaining agreement which would start the Section 10(b) period running. *A & L Underground*, 302 NLRB 467 (1991).

CONCLUSIONS OF LAW

1. Respondent, Marvin Neiman, individually, and d/b/a Concourse Nursing Home, and its alter ego CNH Management Associates, Inc., and its alter ego Concourse Rehabilitation and Nursing Center, Inc., are alter egos and a single employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 144, Service Employees International Union, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, the Union has been the designated exclusive collective-bargaining representative of Respondent's employees in the following appropriate bargaining unit within the meaning of Section 9(b) of the Act.

> All service employees, including nurses' aides, orderlies, recreation aides, therapy aides, dietary and kitchen employees, laundry employees, and licensed practical nurses.

4. By failing and refusing to make the following contributions to the Funds, and by failing to submit remittance reports to the Funds, as set forth below, Respondent violated Section 8(a)(1) and (5) of the Act:

> *Welfare Fund*: Balance due for the month of January, 1996, and all contributions due since February 1, 1996.
>
> *Pension Fund*: All contributions due since June 1, 1995.
>
> *Education Fund*: All contributions due since October 1, 1995.

5. By failing and refusing to bargain collectively by failing to meet with and bargain with the Union on about July 25, 1995, Respondent violated Section 8(a)(1) and (5) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 8(a)(1) and (5) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that the Respondent make the welfare fund, pension fund, and the education fund whole for any contributions that it was required to make under the terms of the collective-bargaining agreement. I shall also recommend that Respondent reimburse any employee who having incurred expenses to the extent that such expenses were not reimbursed by the welfare fund would have been reimbursed if payments had been made to the fund. In the event that sums are due to employees, they shall be made whole with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and any sums due to the welfare fund shall be computed as set forth in *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Marvin Neiman, individually, and d/b/a Concourse Nursing Home and its alter ego CNH Management Associates, Inc., and its alter ego Concourse Rehabilitation and Nursing Center, Inc., Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to make the following contributions to the Local 144 Funds, and by failing to submit remittance reports to the Funds, as set forth below:

> *Welfare Fund*: Balance due for the month of January, 1996, and all contributions due since February 1, 1996.
>
> *Pension Fund*: All contributions due since June 1, 1995.
>
> *Education Fund*: All contributions due since October 1, 1995.

(b) Failing and refusing to bargain collectively by failing to meet with and bargain with the Union on about July 25, 1995.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All service employees, including nurses' aides, orderlies, recreation aides, therapy aides, dietary and kitchen employees, laundry employees, and licensed practical nurses.

(b) Pay into the Union's Welfare Fund, Pension Fund, and Education Fund on behalf of its unit employees, those contributions it failed to make, as set forth above, in the manner set forth in the remedy section of this decision, and file with the Funds those reports which are required the by collective-bargaining agreement.

(c) Make whole any employees for any losses suffered by reason of its unlawful failure to make the payments to the Union's Funds, as set forth above, in the manner set forth in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in the Bronx, New York, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 7, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."